UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK PARTY SHUTTLE, LLC	§	
Employer,	§	
	§	
and	§	**Case No. 02-CA-073340**
	§	
FRED PFLANTZER,	§	
An Individual.	§	

RESPONDENT'S REPLY
TO THE GENERAL COUNSEL'S ANSWERING BRIEF
ON RESPONDENT'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE FOR REGION 2

New York Party Shuttle, LLC ("NYPS"), Respondent in the proceedings before the Administrative Law Judge, replies as follows on its exceptions to the decision rendered on September 19, 2012.

I. SUMMARY OF ARGUMENT ON REPLY

1. The evidence in the record does not support a finding that Respondent NYPS violated the National Labor Relations Act (the "Act"). In particular, there is no evidence that Pflantzer was actually terminated. In fact, Pflantzer's own testimony from the hearing was that he ceased soliciting shifts from NYPS. NYPS management testified that Pflantzer was presumably busy with his own business, and did not request to be scheduled for shifts with NYPS after March 2012.

2. The fact of Pflantzer actively operating a competing tour business with NYPS, advertised through the same marketing avenues, and making use of confusingly similar names as NYPS's tours, shows that Pflantzer had motives for making disparaging remarks about NYPS for reasons apart from any unionizing effort.

3. Pflantzer's communications about NYPS were not made to other NYPS employees, nor was Pflantzer an employee himself. An objective weighing of the factors shows that Pflantzer was an independent contractor for NYPS, just as Pflantzer's own business utilizes independent contractors. Further, the content of the messages does not indicate an effort at unionizing, any effort to further the common interest of NYPS employees, or an effort to publicize or resolve any labor dispute.

II. ARGUMENT & AUTHORITIES

A. Reply on NYPS's Exception (a): Pflantzer not an NYPS employee

4. NYPS excepts to the conclusion reflected in the ALJ Decision that Pflantzer was a NYPS employee under the Act. In particular, NYPS points to the right-to-control test and to Pflantzer's operation of a competing business in the same territory. The General Counsel responds that NYPS failed to meet its burden of proof to show that Pflantzer was not an employee, therefore employee status should be presumed.

5. Respondent argues four factors from the traditional common-law agency test in support of the conclusion that Pflantzer was an NYPS employee: 1) the method of payment, 2) supply of the instrumentalities, 3) belief of the parties regarding an employment relationship, and 4) whether the work is part of the employer's regular business. As to the method of payment, while payment by the tour would clearly demonstrate a contract relationship, hourly payment does not strongly indicate an employment relationship. Tradesmen are often paid on an hourly basis in arrangements that are clearly not employment. An hourly compensation scheme at NYPS fairly compensates its drivers and tour guides for situations where a tour is delayed or runs long. Accordingly, this factor does not weigh in favor of a finding of employee status.

6. As to the supply of instrumentalities, NYPS simply provides the transportation from the loading point to the various sightseeing stops and back. Pflantzer and other NYPS tour guides present their own material on the tours (Tr. at 91:5-16; 112:3-7, 13-16). Also, while the General Counsel argues that Pflantzer only "conducted Respondent-designed tours," Pflantzer admitted at the hearing that he also led private tours for NYPS, in which he developed the attractions featured and the routes (Tr. at 90:24-91:4). Also, a key tool of Pflantzer' trade is his license issued by the New York Department of Consumer Affairs, that allows Pflantzer to lead tours in New York City for any tour company, including his own (Tr. at 89:4-90:5). This is the primary requirement to lead tours, and it is obviously and exclusively in Pflantzer's own control. Thus, the balance of considerations regarding the supply of instrumentalities indicates that Pflantzer was an independent contractor.

7. As to the belief regarding employment relationship of the parties, the General Counsel points to the fact that wages paid to Pflantzer were reported to the IRS on a W-2 form. Again, while this would not be inconsistent with an employment relationship, it is not evidence that the parties believed they had created an employment relationship. This is a simple matter of preferred accounting and reporting practices. Counsel for NYPS stated at the hearing that tour guides and driver are engaged on an ad hoc basis, and it was stipulated that NYPS assigns them to particular shifts accordingly (Tr. at 55:7-10). Also, the fact that NYPS contributed to an unemployment compensation insurance fund indicates only that Pflantzer may be an employee for purposes of New York's unemployment compensation, which is undoubtedly defined more broadly than under the National Labor Relations Act.

8. Finally, NYPS acknowledges that the role performed by tour guides is an essential function of its business, as it promotes and sells guided sightseeing tours in New York City. However, this does not indicate that Pflantzer was a NYPS employee. As the top-level party in contractual privity with its tour passenger customers, NYPS can fulfill its obligations directly, with its own labor force, or through subcontract arrangements.

9. The factors that the General Counsel does not address likewise weigh against employee status. Most importantly, NYPS did not retain the right to control and direct the performance of Pflantzer in his work, as proved through the evidence of NYPS management and Pflantzer himself. Also, Pflantzer did not work regular hours with NYPS. He was called to work only on days and at times at which NYPS had tours for him to guide, and only on days on which he was able and willing to work, *i.e.*, the company did not determine his work schedule, he did. (*See* Tr. at 9:19-10:13). On the basis of the above, the Board should reject the ALJ's conclusion that Pflantzer was a NYPS employee.

B. Reply on NYPS's Exception (b): Timing issues, inconsistency in decision

10. This point of exception is straightforward. The ALJ's Decision includes a finding that NYPS's failure to schedule Pflantzer for work from early January until February 11, 2012 was "not unlawful" (ALJ Decision at 3:50-4:2). Accordingly, NYPS excepts to the punitive measures imposed in the Decision, as they would only be appropriate based on a finding of unlawful conduct. As explained in NYPS's Exceptions Brief, there was no termination based on the February 11 email and Facebook post. If the finding is that NYPS did nothing unlawful before that time, there is no basis for entry of an order such as outlined in the ALJ Decision. The evidence was that Pflantzer last led

tours for NYPS on January 3, 2012 or earlier (Tr. at 71:4-13). The undisputed testimony was that January through mid-March is a historically slow season, and that Pflantzer was not assigned to tours for this reason (Tr. 98:17-22).

C. Reply on NYPS's Exception (c): No conceded grounds for termination

11. NYPS excepts to the finding that it conceded that Pflantzer would not have been terminated but for the disparaging remarks in his email and Facebook post. The General Counsel alludes to NYPS's Response to Charge of Fred Pflantzer (Exh. GC 5) as a binding judicial admission, with no legal authority to support that contention. The evidence at the hearing was that Pflantzer, like Luke Miller before him, would have been terminated for operating a competing business, regardless of the email and Facebook post (118:9-23). Also, there was evidence presented of complaints about Pflantzer's job performance (Tr. at 97:7-17), availability (Tr. at 97:18-19), and relations with coworkers (Tr. at 120:5-15) that may have been grounds for termination at any time.

D. Reply on NYPS's Exception (d): Concerted activity and Pflantzer's motive

12. NYPS excepted to the ALJ finding that Pflantzer's email and Facebook post constituted protected activity under the Act. In response, the General Counsel argues that these communications were aimed at unionizing, and, on that basis, advances a presumed determination that NYPS derivatively violated Section 8(a)(1) of the act. The record shows that Pflantzer's real motive was competition with NYPS, and therefore does not support a finding of concerted activity, as outlined below.

13. In Pflantzer's rant about OnBoard Tours (the brand under which NYPS tours are marketed), there are two lines which mention a labor union—the mention of no union presence at OnBoard, and the allegation that he was not assigned to tours because

of his unionizing efforts (Exhs. GC-3 & 4). The record demonstrates that these allegations are simply not credible. Pflantzer admitted on cross-examination that he had only undertaken a single conversation with a single employee about organizing a labor union (Tr. at 71:9-13; *see also* Tr. at 68:3-8 (emphatically denying union conversations in October and November 2011). Later he claimed to have had other conversations, but he acknowledged that these took place after he was no longer on the schedule with NYPS (Tr. at 78:2-5). Further, the undisputed testimony was that about this same time, Pflantzer stopped submitting his availability to be scheduled for tours with NYPS or inquired about available shifts (Tr. at 104:1-7).

14. Moreover, the record is completely devoid of any evidence that the email and Facebook post that the General Counsel presents as concerted activity was shared with any NYPS employees. In particular, Pflantzer admitted that there were no NYPS drivers or tour guides among the members of the Facebook page where his remarks were posted (Tr. at 66:21-67:2). Also, there is no evidence that the email was sent to any NYPS workers (*See generally* Tr.; Exh. GC-3 (indicating no "onboardtours.com" addressees). While the term "employees" may be construed broadly, there is no call to action in Pflantzer's communications, nor a manifestation of participation by others, whether workers for NYPS, City Sights, or others (*See* Exhs. GC-3 & 4). Further, Pflantzer admitted that that he had not addressed the matters set out in the email and Facebook post with NYPS management (Tr. at 69:3-6).

15. Being that the communications at issue involved no fellow NYPS employees or management, the cases that the General Counsel cites involving such communications are inapposite. Taken as a whole, the record clearly shows that

Pflantzer was acting out of spite, and in furtherance of his competing business, as addressed in more detail in Section II.F below. As such, there is no basis for a finding of concerted activity.

E. Reply on NYPS's Exception (e): Libelous nature of Pflantzer's writings

16. Pflantzer operates a competing business with NYPS (Tr. at 80:23-25). That business operates as NYSee Tours, a name confusingly similar to NYPS's "NY See It All!" Tour, which Pflantzer worked on, among other NYPS tours (Tr. at 83:2-25; Exh. Resp-5). Pflantzer's tone in his email and Facebook post is targeted to damaging the reputation of NYPS, his former employer and competitor in the New York City sightseeing tour business (*See* Exhs. GC-3 & 4). A statement made with malice is one made with knowledge of its falsity or a reckless disregard for its falsity. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279, 80 (1964). Here, Pflantzer was shown to have made statements that were untrue about NYPS, so that he could not have made them with a good-faith belief that they were true. Most pointedly, Pflantzer's allegation that the company did not make a health insurance plan available to its workers was altogether false; the simplest inquiry to NYPS management or a coworker would have informed Pflantzer otherwise (Tr. at 127:2-17). Also, Pflantzer presented no testimony to support his allegations of unsafe working conditions on NYPS busses (*See general* Tr.).

17. The evidence shows that Pflantzer did not have a good-faith belief for making his accusations about NYPS. Also, within three weeks of his communications to outsiders about NYPS, Pflantzer was no longer applying for shifts or continuing to work with NYPS and instead was operating tours in competition with NYPS (Tr. at 104:1-7). Pflantzer made no response to NYPS's direct request for him to cover tours in March

2012 (Tr. at 104:2-7), presumably because of his involvement with his own tour business (*Id.*). In total, the evidence in the record makes clear that Pflantzer was not really interested in organizing a union at NYPS, improving working conditions at NYPS, or continuing to work at NYPS at all. Instead, Pflantzer's real motive in making his disparaging remarks to other tour guides was to gain a competitive advantage by undercutting the appeal of NYPS to drivers and tour guides in New York City.

F. Reply on NYPS's Exception (f): Competition as basis for termination

18. The only testimony presented at the hearing was that NYPS would not have continued assigning Pflantzer to tours while he ran a competing business (Tr. at 118:9-23). Pflantzer presented no evidence to suggest otherwise (*See generally* Tr.) NYPS's director of operations testified that the very reason for not continuing to work with competitors was that solicited business away from NYPS and tended to post negative reviews on Internet sites to drive business away from NYPS (Tr. at 118-24:119:12). This was exactly the situation with Pflantzer. His communications to other tour guides were made for the purpose of advancing his own business by circulating damaging information about NYPS, without regard for what part of it was untrue.

G. Reply on NYPS's Exception (g): No termination for union activity

19. The record does not support the conclusion that Pflantzer was terminated for unionizing. The only mentions of unionizing efforts by Pflantzer were his single conversation with one coworker in December about organizing a union (Tr. at 71:9-13), the passing mention of a union at two lines in the email and Facebook post (Exhs. GC-3 & 4), and conversations with five to seven others after he was no longer working with NYPS (76:10-20). Interestingly, Pflantzer presumably has no union presence at his own

company, as that business is staffed by independent contractors rather than employees (Tr. at 84:7-16).

20. As for NYPS, its director of operations testified that he was in favor of a union presence (Tr. at 127:18-128:7). Testimony was that workers routinely complain of the same general types of matters as Pflantzer (Tr. at 121:9-13). Specific complaints such as the microphones on the busses, expired Department of Transportation stickers, weak air conditioning, and paychecks bouncing were acknowledged; further, that all of the complainants still receive work assignments from NYPS (Tr. at 124:13-22, 126:10-16). NYPS further denied that anyone was fired for complaining of working conditions on its fleet of buses (Tr. at 124:17-22). None of this testimony was disputed by Pflantzer (*See generally* Tr.).

H. Reply on NYPS's Exception (h): No effort to publicize a labor dispute

21. In its final point of exception, NYPS challenged the ALJ's Decision for suggesting that Pflantzer was "publicizing a labor dispute". In the first place, there is no effort of an ongoing labor dispute between Pflantzer and NYPS. The ALJ decision points to checks issued to NYPS workers without sufficient funds to cover them and "safety violations" with NYPS busses (ALJ Decision at 6:25-29). As to the paychecks, NYPS gave testimony that it conducted conference calls to address employee concerns and complaints (Tr. at 126:23-127:1). Also, NYPS did stipulate that it had received citations was testimony that NYPS had received citations for expired DOT stickers (Tr. at 39:7-10). However, there was no testimony that NYPS's busses were unsafe, as alleged in Pflantzer's email and Facebook post (*See generally* Tr.).

III. PRAYER

WHEREFORE, Respondent New York Party Shuttle, LLC respectfully re-urges its request that the Board grant it relief from the Decision of the Administrative Law Judge as set forth in its Exceptions Brief.

November 28, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on the National Labor Relations Board through its Regional Director on the 28th day of November 2012 in the manner indicated below.

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